UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STACIA HALL, *et al.*, **Plaintiffs,** **v.** **DISTRICT OF COLUMBIA BOARD OF ELECTIONS,** **Defendant.**	**No. 1:23-cv-01261-ABJ**

REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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INTRODUCTION

What is most remarkable about Plaintiffs' Opposition is what it lacks. *See* Pls.' Mem. of P. & A. in Opp'n to Def.'s Mot. to Dismiss (Pls.' Opp'n) [12]. Plaintiffs lack a single case recognizing an Article III injury due to vote dilution from mere expansion of the electorate. Plaintiffs lack a single case holding—ever—that non-citizen voting is unconstitutional, despite its ubiquity at the Founding. Plaintiffs lack a single case recognizing a substantive due process right of citizens to exclude non-citizens from the vote. Plaintiffs lack a single case holding that laws expanding the electorate are somehow discriminatory on their face. And Plaintiffs lack a single case recognizing a judicially enforceable "right to citizen self-government." Plaintiffs' claims, then, are too lacking to survive dismissal.

ARGUMENT

I. Plaintiffs Lack Standing.

Plaintiffs press a theory of standing that neither the Supreme Court nor D.C. Circuit has recognized and that Article III will not tolerate. While Plaintiffs invoke cases involving "vote dilution," none of those cases recognized a theory of standing based on vote dilution due to the mere expansion of the electorate. Pls.' Opp'n at 3–5. Rather, the Supreme Court and D.C. Circuit have recognized vote dilution as an Article III injury when "votes are disfavored Vis-a-vis [*sic*] those of some other group." *Daughtrey v. Carter*, 584 F.2d 1050, 1056 (D.C. Cir. 1978); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1935 (2018) (Kagan, J., concurring) (explaining that cognizable vote dilution "arises when an election practice—most commonly, the drawing of district lines—devalues one citizen's vote as compared to others"). Critical to the definition of vote dilution is the differential weighing of votes. Mem. of P. & A. in Supp. of Def.'s Mot. to Dismiss Pls.' Compl. (Def.'s Mot.) [8] 6–7. And differential weighing is so critical because the real harm of vote dilution is discrimination. *See Allen v. Milligan*, 143 S. Ct.

1487, 1503 (2023) (explaining that "[t]he essence" of a vote dilution claim "is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters," "where an electoral structure operates to minimize or cancel out minority voters' ability to elect their preferred candidates" (internal quotation marks and citation omitted)); *Hudson v. Haaland*, 843 F. App'x 336, 338 (D.C. Cir. 2021) (explaining that cognizable vote dilution occurs by "irrationally favor[ing]" one class of voters over another (internal quotation marks omitted) (quoting *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020))).

Under the Local Resident Voting Rights Amendment Act of 2022 (the Act), D.C. Law 24-242, 69 D.C. Reg. 14,601 (Dec. 2, 2022), citizen votes are not weighted or treated differently from non-citizen votes. One vote cast by a Plaintiff will have the same value as a non-citizen's vote—one vote. So this is not a true vote dilution case. Indeed, the D.C. Circuit has already rejected a similar theory of vote dilution based on expansion of the electorate by reasoning that, even with additional votes in the pool, plaintiffs' votes were not "disfavored." *Daughtrey*, 584 F.2d at 1056.[1]

It would be error to expand the concept of vote dilution to cover this case. That is because when "vote dilution" occurs simply as a mathematical function of an expanded electorate, the real harm of vote dilution recognized in past cases—discrimination—is not

[1] *Daughtrey* also reasoned that the plaintiffs, voters from various jurisdictions challenging the restoration of draft dodgers' voting rights, did "not contend that their votes are diluted in any particular election or in any particular geographical area," so any dilution was too speculative. 584 F.2d at 1056. Plaintiffs here suffer from a similar problem because the Court can only speculate as to the effects of the Act in elections yet to be held. Plus, Plaintiffs do not even *allege* that they intend to vote in any "particular election." *Id.* Their tardy statement in their brief about wanting to someday "participate in D.C. elections" does not cure the *pleading* deficiency. Pls.' Opp'n at 5.

present. Instead, Plaintiffs only complain of "a byproduct of the voting scheme." *Hudson*, 843 F. App'x at 338. But because any bare mathematical injury from an expanded electorate "is shared by all," it is "not the sort of vote dilution theory that courts have found to support standing." *Id.*

Nor are Plaintiffs correct that any "vote dilution" they may experience resulting from an expanded electorate is sufficiently particularized. Plaintiffs cherry-pick language from apportionment and gerrymandering cases to argue that "[t]he harm of vote dilution . . . is individual and personal in nature." Pls.' Opp'n at 3 (internal quotation marks omitted) (quoting *Gill*, 138 S. Ct. at 1935 (Kagan, J., concurring)). But what the Supreme Court has held is that, in those cases, "the injuries giving rise to those claims were individual and personal in nature because the claims were brought by voters who alleged facts showing disadvantage to themselves as individuals." *Gill*, 138 S. Ct. at 1930 (majority) (internal quotation marks and citations omitted). A "disadvantage," *id.*, is missing here. The Supreme Court has never gone further and held that a person whose voting power is reduced by the inclusion of new voters has suffered a "disadvantage" that qualifies as an individualized injury sufficient for standing.

None of Plaintiffs' other cases state such a rule. In the census apportionment context, the Supreme Court has recognized that cognizable vote dilution occurs when a census method would cause a voter to lose a representative in Congress. *Dep't of Com. v. U.S. House of Representatives*, 525 U.S. 316, 331–32 (1999); *Citizens for Const. Integrity v. Census Bureau*, No. 21-cv-3045, 2023 WL 2992466, at *3 (D.D.C. Apr. 18, 2023) (three-judge court), *appeal docketed*, No. 23-5140 (D.C. Cir. June 26, 2023). But here, the expansion of the number of possible voters does not result in Plaintiffs losing a representative in District or federal government (nor do they allege so). Also in the census apportionment context, cognizable vote

dilution may occur when a census method will increase the count of certain groups, thereby diminishing the population count—and thus representation and voting power—of localities with less population in those groups. *Dep't of Com.*, 525 U.S. at 332–33. But here, there is no diminishment of voting power of citizen voters "vis-à-vis" non-citizen voters. *Id.* at 333.

Nor does *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994), authorize the expansion of vote dilution precedent that Plaintiffs seek. *Michel* was a challenge by Members of Congress and their constituents to a House rule allowing delegates from the District and U.S. territories to vote in the Committee of the Whole. *Id.* at 624–25. The Court started from the proposition that the Members had standing because "their voting power has been diluted" since they would each now be one vote of 440 instead of 435. *Id.* at 625–26. The Court then held that the constituents had "derivative" standing, *id.* at 626 (internal quotation marks omitted), "to raise a claim that their vote was diluted because previously they had a right to elect a representative who cast one of 435 votes, whereas now their vote elects a representative whose vote is worth only one in 440," *id.* at 626.

Michel does not stand for the proposition that the expansion of the *general electorate* works a sufficiently particularized injury on voters. Instead, *Michel* relied on precedent that *legislators* suffer injuries when their power and sway over the chamber are diminished. *Id.* at 625 (citing *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1982)); *see McCarthy v. Pelosi*, 480 F. Supp. 3d 28, 33 (D.D.C. 2020) (explaining that *Michel* and similar cases "all speak of voting power, and consequently the dilution of that voting power, in similar terms; a Members' voting power is defined relative to the entire congressional body"), *aff'd*, 5 F.4th 34 (D.C. Cir. 2021). Legislator standing is its own body of law, and the special interests and issues associated with legislators' power counsel against extending *Michel* outside its legislative context. *See Michel v.*

McConnell, 217 F. Supp. 3d 269, 272 (D.D.C.) (explaining that the vote dilution in *Michel* involved "some form of actual structural denial of their representative's right to vote"), *aff'd*, 664 F. App'x 10 (D.C. Cir. 2016) (per curiam). Moreover, the *Michel* court "was presented with a set of facts under which dilution could be numerically ascertained" (1 out of 435 versus 1 out of 440). *Kardules v. City of Columbus*, 95 F.3d 1335, 1349 (6th Cir. 1996); *see also McConnell*, 217 F. Supp. 3d at 272 ("The prototypical vote-dilution cases involve a mathematical showing of the loss of a representative voice."). But Plaintiffs' claim of vote dilution is far more generalized and speculative because Plaintiffs have presented no facts or even allegations to predict how many non-citizens will vote or what effect their vote will have. *See Daughtrey*, 584 F.2d at 1056 (rejecting vote dilution theory when the alleged dilution was "so diffuse, minute, and indeterminable").

Unlike *Michel*, the cases surrounding the 2020 election cited by the District are closer to addressing—and rejecting—Plaintiffs' argument that an expansion of the electorate gives rise to a cognizable vote dilution injury. Def.'s Mot. at 5–6. Plaintiffs' attempts to discount those cases are unpersuasive. Plaintiffs first try to confine those cases by saying that they only address vote dilution as a result of voter fraud. Pls.' Opp'n at 6. That is not so. In the Pennsylvania case, for example, one of the theories was that the Pennsylvania Supreme Court had unlawfully extended the ballot deadline, and any ballots received after the deadline diluted the votes from ballots received before the deadline. *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 358 (3d Cir. 2020), *vacated as moot sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021). The Third Circuit rejected that theory, reasoning that "[a]lthough the [ballots received before the extended deadline], under Plaintiffs' theory, should make up 100% of the total votes counted and the [ballots received after the extended deadline] 0%, there is simply no differential weighing of the

votes." *Id.* The court, then, did not find a lack of standing simply because the plaintiffs were only asserting "a generalized interest in the proper operation of government," *i.e.*, fraud-free elections. Pls.' Opp'n at 6. Rather, the court held that standing was lacking because precedent does not permit a theory that allegedly unlawful votes (there, extended-deadline ballots; here, non-citizen votes) caused by an allegedly unlawful election policy (there, the state court's deadline extension; here, the Act) dilute a plaintiff's vote such that he/she suffers an Article III injury. *Bognet*, 980 F.3d at 358. What is more, the D.C. Circuit, albeit in a non-precedential opinion, has adopted this same reasoning from *Bognet*—in a case that did not involve voter fraud at all. *Hudson*, 843 F. App'x at 338.

Plaintiffs next argue that the 2020 cases suffered from lacking a "point of comparison," Pls.' Opp'n at 6 (internal quotation marks omitted) (quoting *Wood*, 981 F.3d at 1314), while here "the point of comparison is a point in time" in that Plaintiffs' votes will be in a larger pool after the Act, *id.* at 6–7. Plaintiffs misunderstand these cases. The courts spoke of a point of comparison because cognizable vote dilution occurs when, comparing two groups' votes, the votes are weighed differently. *See Wood*, 981 F.3d at 1314 ("[V]ote dilution occurs when voters are harmed compared to 'irrationally favored' voters from other districts." (quoting *Baker v. Carr*, 369 U.S. 186, 207–08 (1962))); *Bognet*, 980 F.3d at 358 ("[A] disadvantage to the plaintiff exists only when the plaintiff is part of a group of voters whose votes will be weighed differently compared to another group."); *Hudson*, 843 F. App'x at 338 (relying on *Wood* and *Bognet* to explain that no cognizable vote dilution occurs when votes were "weighed and were counted equally"). Plaintiffs cite no case—and the District is aware of none—holding that the disadvantage can be judged by comparing the same group at different points in time. Rather, because vote dilution is a species of discrimination, courts compare how votes of two different

groups are treated (*e.g.*, voters in different districts). In any event, Plaintiffs' votes will count the same in future elections as they did before (as one vote). *See Bognet*, 980 F.3d at 358 (holding that vote dilution resulting from extending the ballot deadline was not cognizable because "no Pennsylvania voter's vote will count for less than that of any other voter").

In sum, Plaintiffs incorrectly use the concept of "vote dilution," which refers to a specific "type" of injury that is not present here. *Hudson*, 843 F. App'x at 338. The only way Plaintiffs can have standing would be to expand vote dilution case law. But keeping vote dilution within its current bounds makes good sense. As the 2020 cases teach, losing candidates, disgruntled voters, and more will use mathematical vote dilution theories like Plaintiffs' here as their ticket into federal court to raise generalized grievances about election processes—or even to overturn election results.[2] By rejecting these theories, courts across the country have laudably kept election disputes with the political branches and kept election outcomes with the people. This Court should do the same. Plaintiffs, no doubt, disagree with the policy wisdom of extending the right to vote to all residents of a community. In any democracy, it is their right to disagree. But in *our* democracy, the United States courts are not a forum to air policy disagreements. *Carney v. Adams*, 141 S. Ct. 493, 499 (2020). That forum is the Council's chamber, the halls of Congress, or the ballot box—not a courtroom.

As a final ploy, Plaintiffs argue that their allegations of constitutional violations are enough to establish standing. Pls.' Opp'n at 7. Plaintiffs incorrectly conflate standing and the

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[2] *E.g.*, *Wood*, 981 F.3d at 1310; *Bognet*, 980 F.3d at 345–46; *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1000 (D. Nev. 2020); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 706, 711 (D. Ariz. 2020); *Election Integrity Project Cal., Inc. v. Weber*, No. 21-cv-32, 2021 WL 4501998, at *4 (C.D. Cal. June 14, 2021), *aff'd in part, vacated in part*, No. 21-56061, 2022 WL 16647768 (9th Cir. Nov. 3, 2022); *Moore v. Circosta*, 494 F. Supp. 3d 289, 312 (M.D.N.C. 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020); *Martel v. Condos*, 487 F. Supp. 3d 247, 253 (D. Vt. 2020).

merits. To have standing, Plaintiffs must show that the alleged constitutional violations (even assuming they occurred) harmed Plaintiffs in a concrete, particularized way. *Carney*, 141 S. Ct. at 498–99. To illustrate, in *Carney*, the plaintiff challenged, as a violation of the First Amendment, a provision requiring partisan balance on Delaware's courts. *Id.* at 496–47. The Supreme Court explained that, even assuming the plaintiff "is right" on the merits, the fact that he "must live in a State subject to an unconstitutional judicial selection criterion" "does not create standing." *Id.* at 499. Instead, he needed to show a specific harm to him, namely, that the Delaware provision "in fact prevents *him*, a political independent, from having his judicial application considered" and "that he is likely to apply to become a judge in the reasonably foreseeable future if Delaware did not bar him because of political affiliation." *Id.* at 499–500 (emphasis added).

The few cases Plaintiffs cite are not to the contrary. Pls.' Opp'n at 7–8. In each, there was a recognized, concrete harm associated with the constitutional violation. In *McCleskey v. Kemp*, 481 U.S. 279, 291 (1987), a Black capital defendant alleged that "race has infected the administration of Georgia's [capital punishment] statute" in violation of the Equal Protection Clause. So his concrete injury was that, "as a black defendant who killed a white victim," he personally had experienced the discriminatory aspects of Georgia's system. *Id.* In *In re U.S. Office of Personnel Management Data Security Breach Litigation*, 928 F.3d 42, 54 (D.C. Cir. 2019) (per curiam), government employee plaintiffs were victims of a data breach, which they claimed resulted in an invasion of their constitutional right to privacy. So the concrete injury was that the plaintiffs' data had been taken. And in *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012), the injury was discriminatory treatment in that a statute extended a benefit to one class but not the plaintiffs. Such discriminatory treatment is not present here

because the Act does not extend voting rights to non-citizens but not citizens—the Act is instead neutral. At bottom, none of these cases stands for the proposition, for which Plaintiffs cite them, that allegations of a constitutional violation are alone enough to create an injury-in-fact.

To the contrary, Plaintiffs must allege more than simply that they "must live in" a jurisdiction with "an unconstitutional" voter eligibility scheme. *Carney*, 141 S. Ct. at 499. They must allege "a concrete, particularized 'injury in fact' over and above the abstract generalized grievance suffered by all citizens of" the District. *Id.* Their only attempt at an injury-in-fact is their theory of vote dilution. But, for reasons explained, their particular theory of vote dilution does not allege a cognizable injury-in-fact. Thus, Plaintiffs have not shown standing.

II. The Complaint Fails to State a Claim.

A. Plaintiffs Have Not Rebutted the District's Showing That Non-Citizen Voting Was Historically Practiced and Accepted.

Since the District moved to dismiss, the Supreme Court has—again—rejected constitutional claims at odds with "settled and established [historical] practice." *Moore v. Harper*, 143 S. Ct. 2065, 2086 (2023) (internal quotation marks omitted) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)). In response to the District's defense that Plaintiffs' claims are at odds with a long history of non-citizen voting, Plaintiffs offer little in the way of argument and even less in the way of support.

Plaintiffs argue that all the Founding Era history of non-citizen voting marshalled by the District is meaningless because this history "occurred before there was any clear rule about *who was* a United States citizen, that is, before the Citizenship Clause of the Fourteenth Amendment." Pls.' Opp'n at 20. Plaintiffs start off on the wrong foot by arguing that Founding Era history is irrelevant to a historical inquiry. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2136–38 (2022) (explaining that the Founding is the operative reference point

when inquiring into the Constitution's meaning). Although the definition of who is a U.S. citizen was (and still is) complex and changing, there has been—since the Founding—a concept of national citizenship. *Minor v. Happersett*, 88 U.S. 162, 165–66 (1874); *see also* Gerald L. Neuman, *"We are the People": Alien Suffrage in German and American Perspective*, 13 Mich. J. Int'l L. 259, 292 (1992).[3] The Constitution, from its inception, empowered Congress "[t]o establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8. And the First Congress exercised that power by enacting a statute signed by President Washington defining who could become a U.S. citizen. Naturalization Act of 1790, 1 Stat. 103. Contrary to Plaintiffs' suggestion that the statute was only about "procedures," Pls.' Opp'n at 21, the statute set forth substantive qualifications for citizenship (*e.g.*, residency, race), so it helped define the concept of national citizenship, *Minor*, 88 U.S. at 168.

Other historical evidence shows that there was enough of a concept of U.S. citizenship from the Founding that states could have conditioned suffrage on citizenship or courts could have held that such a condition was constitutionally required. One of the original states, Georgia, *did* limit suffrage to citizens. Ron Hayduk, *Democracy for All: Restoring Immigrant Voting Rights in the United States* 19 (2006), https://tinyurl.com/5aepa5bd; Alan Kennedy-Shaffer, *Voters in a Foreign Land: Alien Suffrage and Citizenship in the United States, 1704–1926* 17 (2009), https://tinyurl.com/3rtdh99c (citing Ethel K. Ware, *A Constitutional History of Georgia* 144 (1947)); *see* Ga. Const. art. IV, § 1 (1798) ("The electors of members of the general assembly shall be citizens and inhabitants of this state . . . ."). Likewise, several of the first states

[3] A concept of national citizenship in fact predates the Constitution, as colonies recognized British citizenship and colony citizenship separately, and the Articles of Confederation had a privileges and immunities clause which gave state citizenship "extraterritorial consequences." Neuman, *supra*, at 292.

to enter the Union (*e.g.*, Louisiana, Indiana, Mississippi, Alabama, Maine, Missouri) conditioned suffrage on U.S. citizenship. Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1404 (1993). Plaintiffs admit as much, Pls.' Opp'n at 22, and thus disprove their own theory that early states could not condition suffrage on citizenship because "there was no clear rule about who was a citizen even long after [the Constitution] was adopted," *id.* at 21.

Early judicial precedent further confirms that early Americans understood that national citizenship was its own status—but not a necessary voter qualification. For example, the supreme courts of Pennsylvania and Illinois rejected challenges to non-citizen voting laws and specific arguments that only citizens could vote. *Stewart v. Foster*, 2 Binn. 110, 118 (Pa. 1809); *Spragins v. Houghton*, 3 Ill. 377, 414 (1840). In doing so, both courts recognized a distinction between citizenship and residency. In Pennsylvania, a Pittsburgh law allowed non-citizens to vote for certain offices, but not others, and only allowed citizens to hold office. *Stewart*, 2 Binn. at 117–18. The court upheld the law, reasoning that there was no infirmity in allowing non-citizens to vote, and it was the legislature's power to decide for which offices "the superadded qualification of *citizenship*" should apply. *Id.* at 121. In Illinois, the court surveyed the state's and Nation's histories to find that the "distinction" between U.S. citizenship and residency was "well understood and settled," *Spragins*, 3 Ill. at 404, and Illinois had—with Congress' approval—extended the franchise based only on residency, *id.* at 393, so the court could not require an additional qualification based on citizenship, *id.* at 409. These cases also refute Plaintiffs' argument that, at the Founding, the concepts of the people and the citizenry were "interchangeabl[e]." Pls.' Opp'n at 22; *see Spragins*, 3 Ill. at 403 ("[T]he words citizen and

inhabitant can not be considered synonymous."). Plaintiffs have nothing to say about these cases, although they were cited in the District's Motion. Def.'s Mot. at 11.

All said, history repudiates Plaintiffs' suggestion that states could not have conditioned suffrage on citizenship until the rules of citizenship were clarified with the Fourteenth Amendment. Even if the line between national and state citizenship was not clear, the fact remains that states did not condition suffrage on *any* form of citizenship. Def.'s Mot. at 8–10. Citizenship aside, states always could have limited voting rights to natural-born Americans. But the vast majority of early states did not. *Id.* Instead, citizenship (national or state) and American birth were simply not prerequisites to vote. *Id.*; *see also* Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18(2) Law & Ineq. 271, 275 (2000) ("Through the colonial and early federal period, alien suffrage was often uncontested because voting rights were not based on citizenship, but on property ownership and race, as well as residence."). While Plaintiffs try to discount some state constitutions because they were adopted prior to the ratification of the Constitution, Pls.' Opp'n at 20–21, they continued in force following ratification, *see, e.g.*, *Minor*, 88 U.S. at 173 (surveying voter qualification provisions in early state constitutions); *Stewart*, 2 Binn. at 118 (stating that Pennsylvania, "both under the proprietary government, and since her independence, has held out encouragement to aliens, unknown to the principles of the [English] common law" that non-citizens cannot vote). And regardless of their precise adoption date, they are Founding Era history. *See Moore*, 143 S. Ct. at 2087 (relying on many of the same constitutions cited by the District to reject an argument as historically unsound).

Even accepting Plaintiffs' assumption that there was only a "clear rule" of U.S. citizenship with the adoption of the Fourteenth Amendment, Pls.' Opp'n at 20, Plaintiffs' attempt

to rebut the District's historical showing still fails.[4] In several cases decided *after* the Fourteenth Amendment was adopted, the Supreme Court observed that states may and indeed had extended the franchise to non-citizens. Def.'s Mot. at 11–12 (citing *Minor*, 88 U.S. at 177; *Pope v. Williams*, 193 U.S. 621, 632 (1904); *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973)). In particular, the Supreme Court in *Minor* addressed whether the Fourteenth Amendment's Citizenship Clause or anything in the Constitution required all citizens be allowed to vote. 88 U.S. at 165. The Court, tracing the history of citizenship and suffrage (including non-citizen suffrage), concluded that citizenship and suffrage were historically distinct concepts under the Constitution. *Id.* at 178. Thus, even when national citizenship was—in Plaintiffs' view—clearly defined, the Court rejected the notion that citizenship has "in all cases been made a condition precedent to the enjoyment of the right of suffrage." *Id.* at 177.

Plaintiffs' only response to these cases is to say that the Court simply observed that some states allowed non-citizens to vote if they intended to become citizens, which is "a mere technical infringement" of the Constitution. Pls.' Opp'n at 22. The cases are not so limited. In these cases, the core holding was that the right to vote "does not follow from mere citizenship," so the state may decide who may vote. *Pope*, 193 U.S. at 632; *see also Minor*, 88 U.S. at 177–78. In line with this holding, the Court observed that states "might provide that persons of

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[4] Plaintiffs err in suggesting that the Fourteenth Amendment conclusively settled the definition of U.S. citizenship. The Amendment only provided one "rule" of citizenship, Pls.' Opp'n at 20, that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States," U.S. Const. amend. XIV, § 1. The definition of who is and may become a citizen is far more complex than the Fourteenth Amendment's few words and subject to legislative change. *See Minor*, 88 U.S. at 167 ("The Constitution does not, in words, say who shall be natural-born citizens."); 8 U.S.C. § 1401 *et seq.* (providing rules for citizenship by birth); *id.* § 1421 *et seq.* (providing rules for citizenship by naturalization); Neuman, *supra*, at 293 ("The relationship of national citizenship to state citizenship was only partially clarified by the adoption of the Fourteenth Amendment . . . .").

foreign birth could vote without being naturalized." *Pope*, 193 U.S. at 632. Nowhere did the Court suggest that the reason non-citizen voting is permissible is that aliens intend to become citizens. Instead, the reason is that states historically had not tied voting to citizenship, and states have the power to set voter qualifications. *Minor*, 88 U.S. at 172, 176–77.

Moreover, Plaintiffs' argument that the Supreme Court has blessed "technical infringement[s]" of the Constitution in the past, Pls.' Opp'n at 22, echoes an argument recently rejected by the Supreme Court. In *Moore*, state legislators argued that the Constitution vests the power to make election rules exclusively in state legislatures, unchecked by state constitutions. 143 S. Ct. at 2074. The Court observed that state constitutions at the Founding prescribed election rules. *Id.* at 2087. So the Court rejected the legislators' interpretation of the Constitution because, under the legislators' view, state constitutions were infringing the federal Constitution "from the start." *Id.* Plaintiffs' argument is similar. If Plaintiffs are correct that no government can allow non-citizens to vote, then states, localities, and the federal government have been violating the Constitution "from the start." *Id.* Yet, Plaintiffs ask the Court to ignore this history as "technical infringement[s]" of the Constitution. But courts should not accept constitutional theories that will render centuries of historical practice unconstitutional. *See id.* at 2086.

Cases like *Minor* also disprove Plaintiffs' argument that the Constitution has always evinced a "restriction of the body politic to citizens." Pls.' Opp'n at 9; *see also id.* at 20 (arguing that "[i]t would take a great deal of contrary historical evidence" to overcome the supposed assumption in the Constitution that only citizens can form the political community). The Supreme Court has never held that it is unconstitutional for states or the federal government to include non-citizens in the political process. Such a holding would run headlong into the

historical truth that states and the federal government have long included non-citizens in our democracy. Def.'s Mot. at 8–12. At most in these cases, the Court explained that states "*may*" exclude non-citizens from political processes (although none of these cases were a challenge to a voting restriction). *Foley v. Connelie*, 435 U.S. 291, 296 (1978) (emphasis added); *see also Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982). The Court has not gone so far as to command that states *must* exclude non-citizens.

In fact, these cases support the District. In reasoning that states may exclude non-citizens from political processes, the Court has relied on the principle that a state has "broad power to define its political community" and to set voter qualifications. *Sugarman*, 413 U.S. at 643. Given that principle, the Court has held that the judiciary should take a hands-off approach to states' decisions about whether non-citizens should participate in political processes. *Cabell*, 454 U.S. at 439. Relying on the same principle, the Court has noted that states have historically *included* non-citizens in the political process. *Pope*, 193 U.S. at 632; *Minor*, 88 U.S. at 177–78. Thus, if there is any current running through all this precedent, it is that "alien suffrage is entirely discretionary—neither constitutionally compelled nor constitutionally forbidden." Neuman, *supra*, at 292.

Besides misconstrued Supreme Court precedent, Plaintiffs cite two state trial court cases invalidating non-citizen voting laws in New York and California. Pls.' Opp'n at 23 (citing *Fossella v. Adams*, No. 85007/2022, 2022 NYLJ LEXIS 1150 (N.Y. Sup. Ct. June 27, 2022), *appeal docketed*, No. 2022-05794 (N.Y. App. Div. July 22, 2022), and *Lacy v. City & County of San Francisco*, No. CPF-22-517714, slip op. (Cal. Sup. Ct. July 29, 2022), *rev'd*, --- Cal. Rptr. 3d ----, No. A165899, 2023 WL 5025684 (Cal. Ct. App. Aug. 8, 2023)). Plaintiffs omit that these decisions were (1) decided purely on state law, and (2) reversed or appealed. To the

District's knowledge, no court—state or federal—has ever struck down a non-citizen voting law on federal constitutional grounds.

Plaintiffs' arguments are also just plain unsupported by historical evidence. Plaintiffs only cite three articles for their argument that the concept of citizenship was too unclear prior to the Fourteenth Amendment to place much weight on the fact that non-citizens widely voted at the Founding. Pls.' Opp'n at 22. But each of those articles, in fact, disagrees with Plaintiffs and instead agrees with the District: non-citizen suffrage was historically practiced, and its constitutionality cannot be—and has never been—questioned. Kennedy-Shaffer, *supra*, at 38, 46; Harper-Ho, *supra*, at 275; Raskin, *supra*, at 1397; *see also* Def.'s Mot. at 21 (collecting additional scholarship in agreement).[5] So not only do Plaintiffs fail to put up any primary sources to rebut the District's historical showing, but Plaintiffs also cannot even muster a single secondary source to support them. That makes resolving the historical question in the District's favor straightforward. *See Bruen*, 142 S. Ct. at 2130 n.6 (explaining that "the principle of party presentation" applies in cases involving a historical inquiry, and "[c]ourts are thus entitled to decide a case based on the historical record compiled by the parties" (internal quotation marks and citation omitted)).

B. <u>The Substantive Due Process Claim Fails.</u>

Plaintiffs' Complaint did not plausibly allege a fundamental liberty interest or that the Act failed any form of scrutiny. Def.'s Mot. at 12–17. Plaintiffs' Opposition does not cure these deficiencies.

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[5] Plaintiffs also cite these articles for the proposition that the prevalence of non-citizen suffrage has fluctuated throughout American history. Pls.' Opp'n at 22. The District does not quarrel with that proposition. Def.'s Mot. at 11. But what matters is that non-citizen suffrage was widespread at the Founding (the key reference point), and it has always been allowed. *Id.*

In belatedly trying to provide a "'careful description' of the asserted fundamental liberty interest," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)), Plaintiffs say that "the [Act] dilutes their fundamental right to vote by including noncitizens in the eligible voter and candidate pools," Pls.' Opp'n at 18–19. So Plaintiffs agree with the District that the alleged liberty interest is "a purported right to have one's vote counted without the presence of non-citizens' votes." Def.'s Mot. at 15. As explained, such a formulation does not meet the test for a fundamental liberty interest—and no court has held so. *Id.* Plaintiffs also suggest that the right at issue could be described as "the right to citizen self-government." Pls.' Opp'n at 19. But there is no such right recognized by any court or consistent with history. Argument § II.A, *supra*; Def.'s Mot. at 20–21.

In response to the District's explanation why the Act passes any form of scrutiny, Def.'s Mot. at 15–17, Plaintiffs only argue that the District has no interest (compelling or rational) in defining its political community to include non-citizens, Pls.' Opp'n at 15–16. Plaintiffs misunderstand the interest and the difference between interests and tailoring. The District's interest here is in "democratic self-government," Def.'s Mot. at 17, and Plaintiffs cite no authority holding that such an interest is anything less than compelling, *see id.*; *Sugarman*, 413 U.S. at 642 ("We recognize a State's interest in establishing its own form of government . . . ."). Extending voting rights is the means for furthering that interest, as "the further electoral rights are extended, . . . the strength of democracy increases." Raskin, *supra*, at 1391 (internal quotation marks omitted) (quoting Alexis De Tocqueville, 2 *Democracy in America* 10 (Henry Reeve trans., & Phillips Bradley ed., Knopf 1946) (1840)). After all, the story of the United States is the story of an expanding "circle of voting membership," *id.* at 1392, as generations have strived to create "a more perfect Union," U.S. Const. pmbl. Plaintiffs are incorrect to

suggest that the Constitution mandates that circle stop at citizens, so their argument that the Court cannot recognize the District's rationale here is equally wrong. Argument § II.A, *supra*.

C. The Equal Protection Claims Fail.

To plausibly allege an equal protection claim, Plaintiffs needed to show that the Act either (1) on its face discriminated against citizens or "native-born" Americans, Compl. ¶ 65, or (2) had a discriminatory purpose. Def.'s Mot. at 17–19. Plaintiffs' Complaint did neither. *Id.* In their Opposition, Plaintiffs disclaim any need for the Court to inquire whether the Act had a discriminatory purpose and do not argue that the Act's purpose was to discriminate against citizens. Pls.' Opp'n at 15. They thus forfeit the issue. *Young Habliston v. FINRA Regul., Inc.*, No. 15-cv-2225, 2017 WL 396580, at *4 (D.D.C. Jan. 27, 2017) (Berman Jackson, J.). All, then, that is left to decide is whether the Act is facially neutral.

It is. Def.'s Mot. at 17–18. In arguing otherwise, Plaintiffs misunderstand what "facially neutral" means. A statute is not facially neutral when it "imposes an express . . . classification" that "provide[s] for preferential treatment" of one class. *Rothe Dev., Inc. v. U.S. Dep't of Def.*, 836 F.3d 57, 64 (D.C. Cir. 2016). The Act, however, does not "express[ly]" provide that non-citizens are given any preferences when it comes to voting. *Id.* The Act simply provides that both citizens and non-citizens can vote in District elections, so—as Plaintiffs admit—the Act "treats citizens and noncitizens 'the same' by letting both groups vote." Pls.' Opp'n at 13.

Plaintiffs nonetheless argue that the Act treats citizens and non-citizens differently because "the Act's grant of the *benefit* of voting to noncitizens *burdens* citizens by diluting their votes." *Id.* at 11. In other words, Plaintiffs argue that the Act is not facially neutral because it results in vote dilution. *Id.*; *see also id.* at 12. But vote dilution is an *effect* of the Act, not a classification, apparent on the face of the Act, providing for preferential treatment.

Supreme Court precedent proves the point. The Supreme Court originally held that the Voting Rights Act of 1965 (VRA), 79 Stat. 437, as amended, 52 U.S.C. § 10301 *et seq.*, did not prohibit facially neutral laws, unmotivated by provable animus, that nonetheless had discriminatory effects on voters. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2332 (2021) (discussing *City of Mobile v. Bolden*, 446 U.S. 55 (1980)). Based on that interpretation, the Court held that the VRA did not recognize vote dilution claims. *Id.* In response, Congress amended the statute to provide that election laws that "*result[ ] in* a denial or abridgement of the right . . . to vote on account of race or color" were actionable. *Id.* (internal quotation marks and citation omitted). In amending the statute to allow challenges to discriminatory effects, Congress—as the Court later recognized—made vote dilution claims cognizable. *Id.* at 2332–33. This history of the VRA shows that vote dilution claims are claims about the *effect* of a statute. If vote dilution claims were an attack on facially discriminatory classifications, then Congress would never have needed to amend the VRA to allow for claims based on discriminatory effects.

Indeed, Plaintiffs cannot cite any case holding that a law expanding the electorate facially discriminates against any group. And Plaintiffs have no response to the consensus view that laws expanding the electorate only get rational basis review, Def.'s Mot. at 15–16, which is reserved for facially neutral laws, *Kingman Park Civic Ass'n v. Bowser*, 815 F.3d 36, 42 (D.C. Cir. 2016). Since the District moved to dismiss, another appellate court has agreed—and rejected a "vote dilution" challenge to a non-citizen voting law. *Lacy*, 2023 WL 5025684, at *13–15.

The only cases Plaintiffs cite (both non-binding and both decades old) to argue that expansions of the franchise are facially discriminatory do not support them. Pls.' Opp'n at 11–12 (citing *United States v. Palmer*, 356 F.2d 951 (5th Cir. 1966), and *Brown v. Bd. of Comm'rs*,

722 F. Supp. 380 (E.D. Tenn. 1989)). Neither case held that the law at issue discriminated on its face. In *Brown*, the court made no finding on facial neutrality and instead applied rational basis review to an expansion of the electorate—the standard for facially neutral laws. 722 F. Supp. at 399. In *Palmer*, the court evaluated a parish's decision to close the voter registration office where most potential applicants were Black. 356 F.2d at 952. The court found the closing decision's apparent neutrality—in that the office was closed to *everyone*—was not sufficient to overcome the parish's discriminatory motive, so the parish violated the VRA. *Id.* *Palmer* merely illustrates how a facially neutral law can be discriminatory if motivated by a discriminatory purpose. But Plaintiffs here do not allege or even argue that the Council acted with a discriminatory purpose.

Finally, Plaintiffs argue that the Act "on its face, dilutes the votes of American-born District of Columbia voters . . . because its addition of noncitizens to the voter rolls automatically adds only persons of non-American birth." Pls.' Opp'n at 13. Again, an argument about the Act's dilutive effects is an argument about discriminatory *effects*, not preferential treatment on the face of the Act. The Act on its face says nothing about national origin. Moreover, Plaintiffs' argument that the Act dilutes votes based on national origin makes no sense. Not all citizens are born in the United States, and foreign-born citizens have always voted in District elections. Under Plaintiffs' theory, the Act dilutes their votes, too, by expanding the electorate. So the alleged discriminatory effects are not felt based on national origin because both U.S.-born and foreign-born citizens will allegedly have their votes diluted.

D. <u>The "Right to Citizen Self-Government" Claim Fails.</u>

Plaintiffs cannot state a "right to [exclusively] citizen self-government" claim because no right exists—and certainly not one recognized by any court as judicially enforceable. Def.'s Mot. at 20–21. In response, Plaintiffs do not cite any case from any court greenlighting an even

remotely similar claim. Pls.' Opp'n at 8–11. And Plaintiffs give no good reason for this Court to be the first.

All Plaintiffs can do is selectively quote from a handful of cases and the Preamble to argue that such a right exists. *Id.* But, as explained, Plaintiffs seriously misread those cases. Argument § II.A, *supra*; Def.'s Mot. at 21. Reliance on the Preamble as the source of any cognizable right is likewise misplaced because the Preamble only "indicates the general purposes for which the people ordained and established the Constitution." *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905). It does not "lay out discernable rules or standards that one would expect to have substantive effect." *Virginia v. Ferriero*, 525 F. Supp. 3d 36, 60–61 (D.D.C. 2021), *aff'd sub nom. Illinois v. Ferriero*, 60 F.4th 704 (D.C. Cir. 2023). In any event, Plaintiffs are wrong to read the Preamble—and the Constitution more generally—to only extend notions of popular sovereignty and protections to citizens. *See* Gerald E. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* 145 (1996) ("[P]opular sovereignty in the United States has been a flexible notion, which has not restricted political power by a rigid definition of the People . . . ."); *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016) ("As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270 (1990) ("[A]liens enjoy certain constitutional rights.").

At bottom, the source of constitutional rights is the Constitution's text, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2244 (2022), yet Plaintiffs crib from judicial opinions (which they misread) and the Preamble (which is unenforceable). Plaintiffs thus provide no source of law on which to rest their "right to citizen self-government" claim.

CONCLUSION

For these reasons, the Court should dismiss the Complaint for lack of jurisdiction or failure to state a claim.

Date: August 18, 2023.

Respectfully submitted,

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